AUG 05 1993

No. 93-46

In The

Supreme Court of the United States

October Term, 1993

ANNABELLE L. MARTIN,

Petitioner,

v.

SHEARSON LEHMAN HUTTON, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated August 5, 1993

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondent Shearson Lehman Hutton Inc. ("Shearson") respectfully suggests that the issues framed by petitioner Annabelle L. Martin ("Martin") are more accurately stated as follows:

1. Did the court of appeals correctly reverse the trial court's award of attorneys' fees to Martin under Mo. Rev. Stat. § 409.411 because, under that statute and Missouri law, attorneys' fees are damages which Martin waived when she failed to submit any evidence of attorneys' fees and failed to submit the issue to the jury?

2. Was the court of appeals correct in reversing the jury's award of punitive damages because under Missouri law there was insufficient evidence in the record concerning the outrageous conduct or evil motive of Shearson and because Martin was not entitled to punitive damages under a claim of Shearson's common law *respondeat superior* liability for the acts of Robyn O'Leary?

LIST OF PARTIES

Petitioner Annabelle L. Martin

Respondent Shearson Lehman Hutton, Inc.[1]

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[1] Until July 30, 1993 respondent Shearson Lehman Hutton, Inc. was a wholly-owned subsidiary of Shearson Lehman Hutton Holdings, Inc., which was in turn owned by the American Express Company and the Nippon Life Insurance Company. On July 30, 1993 respondent was sold to and became a wholly owned subsidiary of Primerica and is now doing business as Smith Barney Shearson, Inc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Shearson requests that the Court deny Martin's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

STATUTE INVOLVED

The only statute at issue in this case is Mo. Rev. Stat. § 409.411, the Missouri statute governing liability for unlawful securities transactions.

STATEMENT OF THE CASE

Martin's petition omits several material facts. The issues presented involve questions relating to damages under a state securities statute and state common law principles arising out of two purchases of American Continental Corporation Preferred Stock ("AMCCP").

The purchases in question were not made through Shearson. Rather, both purchases were made through B.C. Christopher Securities Company ("Christopher"), a competing brokerage firm. Martin was directed to Christopher by Robyn O'Leary ("O'Leary"), a Shearson employee, even though Shearson had placed restrictions on AMCCP and had directed O'Leary to make no further recommendations of AMCCP. It was undisputed that, when Martin told O'Leary she wished to purchase AMCCP, (1) O'Leary stated to Martin that Martin should

make the transactions at Christopher because O'Leary was leaving Shearson and joining Christopher;[2] (2) on two separate dates, Martin wrote two checks (one for $60,000 and one for $40,000) to Christopher to purchase AMCCP; (3) Martin received confirmation of the purchases from Christopher; (4) Martin received statements from Christopher showing the securities, and the value thereof, in her account at Christopher; and (5) Martin never signed a client agreement with Shearson. It was further undisputed that Shearson did not receive any commission or other benefit from the transactions.

Although Martin may have been an unsophisticated investor, her investment decision was made with the assistance of her son, Dr. Jeff Martin, who had prior investment experience and understood the relationship between risk and return, *i.e.*, that an investment with a higher return carried a higher risk. After reviewing information provided by O'Leary and having conversations with O'Leary, Jeff Martin reported to Martin that there was a 9% investment and a 19% investment with a guaranteed buy back on the 19% investment, but never identified AMCCP by name. After reviewing the options with her son, Martin called O'Leary and said she wished to purchase the higher return investment which O'Leary then identified to her as AMCCP. Martin stated that she wanted to purchase AMCCP and was then directed to Christopher by O'Leary and made the transaction there. The identification of AMCCP to Martin, her decision to purchase it and the direction to do the first transaction at

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[2] On December 13, 1988, O'Leary did in fact leave the employ of Shearson and become employed by Christopher.

Christopher all occurred in the same conversation. There was a second conversation between Martin and O'Leary, in which Martin said she had more money and wanted to buy more AMCCP. O'Leary again told her to do the transaction at Christopher. The purchases were made on October 19 and October 20, 1988. On April 13, 1989, ACC filed for Chapter 11 bankruptcy. The dividend payments on AMCCP ceased and by June, 1989, Martin's AMCCP stock was essentially worthless.

On December 29, 1989, Martin sued Shearson and O'Leary alleging that O'Leary had misrepresented the safety and "buy back" provision of AMCCP. Martin alleged that Shearson was responsible for the acts of O'Leary as a "controlling person" under federal and state securities laws and was also responsible for O'Leary's fraud and/or negligence under a theory of apparent authority. In addition, Martin asserted claims directly against Shearson for negligence and breach of fiduciary duty. In her complaint, Martin demanded a jury trial on all issues "triable to a jury." Shearson did not make a further jury demand.

Martin's case was tried to a jury. During the trial, she did not submit any evidence concerning her attorneys' fees under Mo. Rev. Stat. § 409.411 and tendered a damage instruction to the jury which omitted any claim for attorneys' fees. The jury returned a verdict against Shearson on Martin's claims for (1) controlling person liability under the federal securities laws; (2) common law fraud; (3) common law negligent misrepresentation; (4) common law negligence; (5) common law breach of fiduciary; and (6) controlling person liability under Mo. Rev. Stat. § 409.411, awarding her $28,795 in actual damages and

$500,000 in punitive damages. After the jury verdict, Martin filed a motion requesting the trial court to award her attorneys' fees under Mo. Rev. Stat. § 409.411 in the amount of $225,141.25. Shearson objected to such motion on the ground, among others,[3] that Martin had not presented evidence on her attorneys' fees or presented that issue to the jury as she was required to do under Mo. Rev. Stat. § 409.411. The trial court entered its order awarding Martin attorneys' fees on January 23, 1992. Shearson filed a timely Notice of Appeal on February 26, 1992 following the trial court's Order of February 14, 1992 which disposed of all claims as to all other parties in the action. On February 18, 1993, the Court of Appeals affirmed the award of actual damages under Section 20 of the 1934 Securities Act, 15 U.S.C. § 77l, but reversed the trial court's award of attorneys' fees and the punitive damage award in their entirety.

Construing Mo. Rev. Stat. § 409.411, the court of appeals reversed the award of attorneys' fees holding that they were part of the damages recoverable under the Missouri statute and that because Martin had brought her action at law, she waived her right to attorneys' fees when she failed to offer any evidence during the trial as to what those attorneys' fees were. The court stated:

> "Based on the Missouri practice relevant to suits for vexatious refusal, and the limited Missouri precedents bearing on this particular issue, we

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[3] Shearson also argued that the amount of the fees awarded were per se unreasonable because they were 7-8 times the actual damages awarded and almost twice the maximum potential recovery under Mo. Rev. Stat. § 409.411.

> hold that plaintiff has lost the right to recover attorneys' fees. We think it significant that plaintiff was unable to direct our attention to a case under Mo. Ann. Stat. § 409.411(a) (Vernon 1990) where a court, not sitting in equity, made an award of fees."

(Opinion, App. 11-12.)

The court of appeals reversed the punitive damages award, holding there was nothing in the record to support a finding of punitive damages under the jury instructions submitted by Martin. The court of appeals specifically found that the punitive damages instructions submitted by Martin did not attempt to impose punitive damages on Shearson under the principle of *respondeat superior*.

REASONS FOR DENYING THE WRIT

This case presents only questions of state law. The court of appeals' ruling that Martin was not entitled to attorneys' fees was based on its construction of a Missouri statute. Its ruling that she was not entitled to punitive damages was based on Missouri case law and the Missouri Approved Instructions on punitive damages. Because neither of these rulings presents a federal question or is in conflict with other federal court precedents and because both rulings were fully in accord with Missouri law, the court of appeals' decision does not merit review by this Court.

I. THE COURT OF APPEALS' RULING THAT UNDER MO. REV. STAT. § 409.411 ATTORNEYS' FEES WERE AN ELEMENT OF MARTIN'S DAMAGES MARTIN WAIVED WHEN SHE REQUESTED A JURY TRIAL AND FAILED TO SUBMIT EVIDENCE CONCERNING HER FEES TO THE JURY WAS CORRECT AND IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OTHER COURT OF APPEALS.

A. Once Martin Made A Jury Demand, The Issue Of Whether Attorneys' Fees Were Damages Under Mo. Rev. Stat. § 409.411 Such That Evidence Of Those Damages Must Be Submitted To The Jury Was A Question Of Missouri Rather Than Federal Law.

The court of appeals properly reversed the trial court's award of attorneys' fees because under Mo. Rev. Stat. § 409.411 attorneys' fees are an element of damages and Martin waived her right to those damages when she requested a jury trial on "all issues . . . so triable" (Complaint 12/29/89, ¶ 89) but then failed to present any evidence of attorneys' fees to the jury. Martin's argument that the court of appeals' ruling is incorrect because *Shearson* did not demand a jury trial on the issue of attorneys' fees when she had in fact made such a demand is, at most, a procedural question of little importance which does not require this Court's attention.

Martin claims that the court of appeals' decision is contrary to Supreme Court precedent and is in conflict with other circuit court decisions because the question of whether a jury trial is required on the issue of attorneys' fees must be determined by federal, rather than state, law. An examination of the opinion below demonstrates

that it was correctly decided and is not in conflict with any decision of this Court or other United States Court of Appeals.

Neither the Seventh Amendment nor any other provision of federal law is implicated by the court of appeals' decision because it was *Martin* who requested that her claim be submitted to a jury. This would include any claim for damages, including attorneys' fees, under Mo. Rev. Stat. § 409.411. Once that jury demand occurred, Martin's right to attorneys' fees became a question of damages to be determined by state law and specifically became an issue of the interpretation and application of the Missouri statute. The court of appeals correctly determined that Mo. Rev. Stat. § 409.411 required Martin to submit proof of such damages to the jury.

In a strained attempt to convince this Court that review of this case is warranted, Martin argues that the availability of attorneys' fees under a Missouri state statute is a question of federal law and that the court of appeals' interpretation of that state statute is in conflict with precedent handed down by this Court and other circuits. The cases cited by Martin, however, do not address the Missouri statute involved in this case and held only that the federal right to a jury trial did not apply to claims for attorneys' fees based upon the contract or statute under consideration in those cases.

The right to a jury trial is not involved in this case. Martin demanded a jury; Shearson acquiesced in and relied upon this demand. Therefore, all issues properly triable to a jury should have been submitted to the jury. The court of appeals correctly construed the question of

attorneys' fees under Mo. Rev. Stat. § 409.411 to be a matter of *damages* governed by Missouri *state* law that had to be submitted to the jury, rather than an issue of a right to a jury trial under federal law.

Martin sought attorneys' fees from Shearson as part of her damages allowed under Mo. Rev. Stat. § 409.411. Under Missouri law, when attorneys' fees are an integral part of a plaintiff's legal damage claim, the trier of fact must decide the issue of fees in the context of the overall damages sought. The court of appeals correctly held that it was incumbent on Martin to submit proof of attorneys' fees to the jury as part of her damages under the statute. See *Dunn v. Bemor Petroleum, Inc.*, 680 S.W.2d 304, 307 (Mo. App. 1984) (court assumed if claim under Mo. Rev. Stat. § 409.411 had been tried to a jury, the question of fees would have been for the jurors); *Hester v. American Family Mutual Insurance Co.*, 733 S.W.2d 1, 3 (Mo. App. 1987) (where plaintiffs sought attorneys' fees under Missouri vexatious refusal statute, issue of fees was erroneously submitted to the jury where no evidence of fees was offered at trial).

When Martin elected to try the issues in this case to a jury, all issues, including attorneys' fees under Mo. Rev. Stat. § 409.411, became triable to the jury. Martin, therefore, had the obligation to produce evidence of those fees. See *Quick v. Woody*, 747 S.W.2d 108, (Ark. 1988) (plaintiffs waived right to attorneys' fees under Arkansas Securities Act by failing to put on evidence of fees at trial); *Holmes v. J. Ray McDermott & Co., Inc.*, 734 F.2d 1110 (5th Cir. 1984) (attorneys' fees integral part of damages under Jones Act claim and plaintiff waived fees by failing to submit evidence of fees to jury). The court of appeals

properly ruled that attorneys' fees were an element of damages under Mo. Rev. Stat. § 409.411 and that Martin lost her right to recover attorneys' fees when she failed to submit evidence concerning fees and failed to tender an instruction requiring the jury to assess fees.

Martin argues that the issue of attorneys' fees under Mo. Rev. Stat. § 409.411 is a matter of federal law and that federal law does not require the issue of attorneys' fees to be presented to the jury. The cases cited by Martin for this proposition are not in point because they do not address attorneys' fees that are an integral part of the damages allowed by statute as is the case with Mo. Rev. Stat. § 409.411. *Columbus Mills, Inc. v. Freeland*, 918 F.2d 1575 (11th Cir. 1990), addressed a statute which specifically stated that the court was to decide the predicate facts which would allow attorneys' fees. *Columbus Mills*, 918 F.2d at 1577 n.1. *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988), addressed a statute which specified that attorneys' fees were to be taxed and collected as "costs" rather than as part of the actual damages. In *Budinich*, this Court specifically distinguished statutes allowing attorneys' fees as costs from statutes which treat fees as substantive or legal relief. *Budinich*, 486 U.S. at 201.

The holdings of *Resolution Trust Corp. v. Marshall*, 939 F.2d 274 (5th Cir. 1991), *Redshaw Credit Corp. v. Diamond*, 686 F. Supp. 674 (E.D. Tenn. 1988) and *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.*, 553 F. Supp. 118 (N.D. Ill. 1982) are also inapplicable because they were all limited to instances where attorneys' fees were sought under a contract and, therefore, were more properly characterized as an equitable remedy collateral to the decision on the merits. In contrast, attorneys' fees under Mo. Rev.

Stat. § 409.411 cannot be considered "costs" or an equitable remedy collateral to the issues on the merits. The Missouri statute requires the trier of fact to add attorneys' fees to the consideration paid for the securities prior to deducting the income received from the securities before the trier of fact can arrive at the final damages figure. As a result, it is essential for the trier of fact to decide the issue of attorneys' fees before the damages allowable under the statute can be finally determined.

Martin also claims that the court of appeals' interpretation of Mo. Rev. Stat. § 409.411 is incorrect because other courts have interpreted other state securities statutes differently. However, decisions from other courts interpreting different state statutes have no relevance with respect to the court of appeals' interpretation of Missouri law and do not present any conflict among the circuits requiring resolution by this Court. Nor do questions of interpretation and application of a state statute, even a uniform act, present "important questions of *federal* law" that should be settled by this Court. Rule 10.1(a)(c), Rules of the Supreme Court of the United States. Further, the cases cited by Martin, *Burgess v. Premier Corp.*, 727 F.2d 826 (9th Cir. 1984), and *Criticare Systems, Inc. v. Sentek, Inc.*, 465 N.W.2d 216 (Wis. App. 1990), are not in conflict with the reasoning or results of the court of appeals because neither case addressed a claim that the plaintiff waived her right to fees because she failed to present evidence of her fees to the jury.

Martin argues that Shearson was not entitled to a jury trial on attorneys' fees because it did not make a jury demand on the issues of attorneys' fees. This argument comes close to conceding that Fed. R. Civ. P. 38 and the

Seventh Amendment, as interpreted in *Curtis v. Loether*, 415 U.S. 189 (1974), would have required a jury trial if Shearson had demanded one. Apparently, Martin's argument is that if Shearson had demanded a jury trial on the issue of attorneys' fees under § 409.411, that issue would have been required to be decided by the jury but since it was Martin who demanded the jury trial, a jury trial on the issues of attorneys' fees was not required. This argument completely undermines Martin's position regarding attorneys' fees because Shearson was entitled to rely upon Martin's jury demand.[4] *See Goldman, Sachs & Co. v. Edelstein*, 494 F.2d 76, 77-8 (2d Cir. 1974); *Pinemont Bank v. Belk*, 722 F.2d 232, 235 (5th Cir. 1984); and *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 690 (9th Cir. 1976). The argument that the court of appeals erred because Shearson had not demanded a jury trial is untenable, and in any event presents an insignificant procedural issue that does not warrant the attention of this Court.

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[4] This argument is also inconsistent with Rule 38 Fed. R. Civ. P. Rule 38(b) which provides that any party may demand a jury trial on *"any issue triable of right . . . "*; Rule 38(c) then provides that a party who has not specified that only certain issues be tried to the jury is "deemed to have demanded trial by jury for all the issues so triable," and that in the event a demand is made for a jury trial on only certain issues, any other party can demand a trial on other issues; finally 38(d) provides that once a demand has been made it may not be withdrawn without the consent of the *parties*. The provision in 38(c) that an unspecified demand is a demand for trial of all issues and the use of the plural *"parties"* in 38(d) clearly establishes that all parties to the litigation can rely on a jury demand made by any party.

B. Shearson Did Not Consent To The Trial Court Deciding The Issue Of Attorneys' Fees As Part Of Martin's Damages.

In an attempt to avoid the consequences of her failure to submit the issue of attorneys' fees to the jury, Martin argues that certain statements made by Shearson's counsel during the instruction conference constituted Shearson's "consent" to having the trial court decide the issue. This is a highly strained misinterpretation of statements made by Shearson's counsel and there is no basis to conclude that Shearson consented to the trial court hearing the issue of attorneys' fees on a post-trial motion.

The timing of the statements relied upon by Martin is particularly significant. The quoted statements occurred at the instruction conference *after the close of the evidence.* Martin had rested her case and all of the evidence had been heard. Martin had failed to produce evidence as to her attorneys' fees as she was required so that the jury could have some basis for making a decision on the issue. Martin had simply failed to present evidence on an element of her required proof. It did not then become incumbent upon Shearson's counsel to raise this failure with the trial court or Martin's counsel or ask that the record be reopened so that evidence of attorneys' fees could be presented to the jury. It is also significant that the issue of whether Martin was entitled to attorneys' fees was not before the trial court at that time. It was appropriate for Shearson to wait until that issue was presented to the court and then raise its objection at that time.

Nor do the statements cited by Martin considered in context constitute consent by Shearson. The discussion was about what could be properly argued to the jury in connection with damages. Counsel for Shearson stated "I don't think they are entitled to tell them that under § 409.411 they are entitled to attorneys' fees". This was completely proper because there had been no evidence of attorneys' fees and, without such supporting evidence, it would be improper to argue such fees to the jury. By no reasonable interpretation can this be viewed as consent to have the trial court decide the matter on post-trial motion.

This situation is not analogous to *West v. Devitt*, 311 F.2d 787 (8th Cir. 1963) or *Smith v. Cushman Motor Works*, 178 F.2d 953 (8th Cir. 1950). In *West* and *Smith*, there was express and unequivocal consent given for the court to address certain issues *prior* to the presentation of any evidence to the jury. Additionally, the plaintiff in *Smith* never demanded a jury trial. In the present case, there had been a jury demand and Shearson never expressed any consent which would allow Martin to bypass the jury with respect to her damages including attorneys' fees. The simple fact is Martin failed to present evidence concerning an essential element of damages and Shearson raised its objection to Martin's attempt to recover attorneys' fees the first time the issue was presented to the trial court.

II. THERE IS NO BASIS FOR THIS COURT TO EXERCISE ITS SUPERVISORY POWER BECAUSE THE COURT OF APPEALS' REVERSAL OF THE JURY'S PUNITIVE DAMAGE AWARD WAS CORRECT AND WAS NOT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

A. There Was No Affirmance Of Any Common Law Verdict On Which *Respondeat Superior* Liability For Punitive Damages Could Be Based.

The court of appeals correctly reversed the jury's award of punitive damages, and Martin's arguments concerning the reversal of the punitive damages award do not merit review by this Court. The sufficiency of evidence concerning the submission of a claim for punitive damages is determined by state common law and does not present any question that requires the consideration of this Court. The court of appeals correctly applied the standard set forth by the Missouri Supreme Court in *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. 1989 en banc), when it determined that the evidence submitted did not establish that Shearson's conduct warranted the imposition of punitive damages.

There was *no* affirmance by the court of appeals of any common law verdict on which *respondeat superior* liability for punitive damages could be based. The court of appeals' opinion only directly affirmed the liability of Shearson under the controlling person sections of the federal securities laws and, at most, tacitly affirmed the verdict on the state securities statute (Opinion, App. 3-6, 8-9.) It is well established that there can be no punitive

damages awarded under federal securities law claims. *Grogan v. Garner*, 806 F.2d 829 (8th Cir. 1986); *Nye v. Blyth, Eastman Dillon & Co. Inc.*, 588 F.2d 1189, 1200 (8th Cir. 1978). The same is true for Missouri securities law claims. *Gales v. Weldon*, 282 S.W.2d 522 (Mo. 1955). In the absence of affirmance of any common law liability which would support an award of punitive damages, Martin's claims concerning errors in the reversal of the punitive damage award need not be considered and it certainly cannot be said that the court of appeals' ruling is so great a departure from the accepted and usual cause of judicial proceedings that this Court's power of supervision is called for by Certiorari.

B. The Court of Appeals Correctly Ruled That There Was Insufficient Evidence To Support A Finding Of Punitive Damages Under Instruction No. 26.

The court of appeals correctly held that there was nothing in the record to support a finding of *respondeat superior* liability for punitive damages under Instruction No. 26. (Opinion, App. 6.) Martin argues she did in fact submit punitive damages to the jury under a *respondeat superior* theory and that the evidence supporting her claims against Shearson for fraudulent and negligent misrepresentation was sufficient to support a claim for punitive damages. Instruction No. 26, which was drafted and tendered by Martin, did not properly submit the issue of punitive damages because it did not require the jury to find that O'Leary's conduct was outrageous as required by Missouri law. *See, Burnett v. Griffith, supra.* Martin's

argument that the instructions on her claims of fraudulent and negligent misrepresentation (Instruction Nos. 17 and 18) were adequate to submit the issue of punitive damages is flawed because those instructions likewise did not submit the issue of O'Leary's outrageous conduct. They required the jury to find only that "O'Leary did not know whether her representations were true or false. . . . " This does not rise to the level of outrageous conduct because of an evil motive or reckless indifference as required by Missouri law. *Burnett v. Griffith, supra*. The simple fact is that nowhere was the jury told that it had to find that the conduct of O'Leary was outrageous in order to award punitive damages. Instruction No. 26 only specifically submitted Shearson's outrageous conduct. There was insufficient evidence to submit the issue of whether Shearson's conduct was outrageous. The court of appeals was thus correct when it held that Instruction No. 26 did not properly submit the issue of punitive damages on a *respondeat superior* basis.

Instruction No. 26 also did not properly allow for punitive damages because it submitted four separate bases for an award of punitive damages in the disjunctive: the fraudulent misrepresentations of O'Leary, the negligent misrepresentations of O'Leary, the negligence of Shearson and the breach of fiduciary duty by Shearson.[5] The jury could have reached its verdict of punitive damages on any one of these bases. Under Missouri law,

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[5] It is again highly significant that the court of appeals' affirmance of the liability verdict was not based on any of these claims. Thus, there was no affirmance of any common law claim to support an award of punitive damages.

when disjunctive claims are submitted, *each* claim must be *independently* supported by submissible evidence. *Wolfe v. Harms*, 413 S.W.2d 204 (Mo. 1967); *Weast v. Festus Flying Service, Inc.*, 680 S.W.2d 262 (Mo. App. 1984). In order to sustain a submission and finding of punitive damages under Instruction No. 26, even under Martin's theory of *respondeat superior*, there would have to be evidence that *both* O'Leary and Shearson acted with the required outrageousness. The court of appeals held that there was no evidence from which it could be found that Shearson acted outrageously. (Opinion, App. 6-7.) Therefore, there was no basis to submit punitive damages under Instruction No. 26 and the court of appeals correctly held that the record did not support an award of punitive damages.

C. Martin Is Not Entitled To An Award Of Punitive Damages Because O'Leary Was Not Acting With Apparent Authority As A Matter Of Law.

Even if Martin had submitted punitive damages under a theory of *respondeat superior*, she still could not recover because O'Leary was not acting as Shearson's agent as a matter of law. Under Missouri law, in order to support *respondeat superior* liability against Shearson, there must be a finding that O'Leary was acting within the scope and course of her employment. In order to meet this requirement, Martin submitted on the theory that O'Leary was acting with apparent authority when she recommended Martin purchase securities at a competing brokerage firm. (See Instruction Nos. 13, 17, 18, App. 54, 55, 56.) Under Missouri law, O'Leary could have had apparent authority only if *Shearson* created such an

appearance of things that it caused Martin to reasonably and prudently believe that O'Leary had power to act as Shearson's agent with respect to Martin's AMCCP transactions at Christopher. *Mahoney v. Delaware McDonalds Corp.*, 770 F.2d 123 (8th Cir. 1985).

In the present case, Shearson's conduct as a matter of law could not have led Martin to reasonably and prudently believe that O'Leary was acting on Shearson's behalf because: (1) in the same conversation in which AMCCP was identified to Martin and in which Martin said she wanted to purchase AMCCP, O'Leary told Martin to purchase AMCCP stock at a competing brokerage firm because O'Leary would be leaving to work there; (2) Martin knowingly sent checks to the competing firm for such purchases; (3) the competing firm sent confirmations reflecting those purchases and monthly statements which reflected the value of Martin's AMCCP in her account at the competing firm; and (4) Martin never received any confirmations or statements from Shearson. No one, no matter how unsophisticated, could reasonably and prudently believe that Shearson had authorized O'Leary to sell stock at a competing firm.

Furthermore, as a matter of law, there was no *act of Shearson* that could have led Martin to believe O'Leary was authorized to so act for Shearson with respect to Martin's AMCCP transactions. Martin's apparent authority theory boils down to the claim that because O'Leary was a Shearson employee and Shearson had an "800" phone number on which Martin contacted O'Leary, it was reasonable for Martin to believe O'Leary was acting for Shearson when she recommended Martin purchase AMCCP at a competing firm. This same claim was

rejected in *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873 (7th Cir. 1992), *cert. denied*, 1992 WL 15322 (U.S. June 21, 1993). Accordingly, O'Leary was not acting within the scope of her employment and there is no basis for *respondeat superior* liability for punitive damages.

The issues of punitive damages under Missouri common law, the evidence necessary to support such damages and the submission of such damages under a mandatory state instruction do not present important question of federal law that need to be resolved by this Court. In holding that the record did not support a finding of punitive damages under the instruction tendered by Martin, the court of appeals did not so far depart from the accepted and usual course of judicial proceeding as to require this Court's supervision.

CONCLUSION

For the foregoing reasons, Annabelle Martin's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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